OGC 76-5164
20 September 1976

MEMORANDUM

SUBJECT: Revision of E.O. 10450

Some thoughts on the draft executive order to replace E.O. 10450. These comments address the draft order in the form revised by the CIA group and forwarded to the Deputy Director on 17 September (Enclosure #1 to the DCI letter).

a. The changes in the definition of "adjudication" may be a step backward. Under the original draft, an agency could weigh the security factors against the needs for the individual and, in effect, elect to take some chances. As modified, this apparently cannot be done; i.e., the adjudication is to be directed only to the likelihood that duties will be performed in a manner consistent with the national interest. Agencies may not opt to accept risk in that regard, which they might want to do because of their unique or special needs for an individual. I understand CIA on occasion does just this, and I am sure it has been done elsewhere in Government.

b. With reference to "adverse determination," are there any "disqualification factors" which are "determined by statute or other Executive Order?" Probably the language should be "of this Order or determined by or pursuant to," etc. But is the added language desirable at all?

OGC FOIAB5 Does not the amended language bring our procedures under those authorities into the new E.O. 10450 procedures? Also, and for the same reasons, do we want to add "or information containing intelligence sources and methods?" (Also, information does not "contain" sources or methods.) If it is desired that the Director set the standards and procedure for access to sources and methods information, it seems self-defeating to provide that the applicable provisions as to adverse determinations are those of the new E.O. 10450.

c. The definition of "Agency head" would weaken the authority of some Intelligence Community agencies and components by excluding the heads of those agencies. The principal officers of DIA and NSA, for example, are not included. Further, since the term "agency" is not defined, presumably an agency is something which is directed or administered by an agency head. This definition arguably would exclude NSA and DIA from the term "agency" throughout the order.

d. I believe the major revision to the definition of "Complaint Investigation" is an improvement, but it would be even better to simply delete the last sentence. Indeed the definition is clear that "complaint investigations" may be directed to questions which do not involve E.O. 10450. For that reason it is illogical and undesirable to tie those investigations to the E.O. 10450 procedures, as the last sentence would do.

e. The revision of the definitions of "full field investigation" may be a step backward. The revision seems to require that such an investigation establish the identity of the individual. Conceivably an investigation, at an early stage, might indicate that the individual is not who he says he is, which is probably all we would need for our purposes, at least in most cases. The revised definition apparently would require that the investigation continue to the point of establishing the true identity. The definition, without the CIA revision, is sufficiently broad to cover the identity issue. Surely information that an individual is not who he says he is is information "necessary and relevant to a determination" of suitability. It should be modified, however, to "necessary or relevant."

f. I would delete "lawful" from the definition of "national interest." The Federal Government has no unlawful interests.

g. Substitution of the word "grave" in the definition of special trust also is a step backward, i.e., it sets a higher standard than that in the definition as distributed by OMB. Manifestly, the OMB guidelines that the damage must be "irreparable" is nonsense, but the order itself does not support that statement. The solution here would be to accept the OMB definition, but to specifically disavow the "irreparable" standard and ask OMB to do so also.

h. The definition of "Sensitive Compartmented Information" probably should be modified to "restricted handling or access." Also, "and their end products" should be bounded by commas. There is no "Section II" of Public Law 585, and Public Law 585 is not the Atomic Energy Act of 1954. The sentence could read "as defined in the Atomic Energy Act of 1954, as amended (42 U.S.C. 2014(y))."

i. Our amendment to the definition of "suitability determination" also may be a step backward. Unamended, the definition means that a suitability determination as to employment in a position which requires access to Top Secret, or involves the subsection 6(b) aspects, is sufficient also for clearance for access to Top Secret or 6(b) information or for assignment to 6(b) duties. It would follow that if the position does not require access to Top Secret then further determinations are required before the individual may be given access to that information or to 6(b) information or be assigned to 6(b) duties. Our amendment would provide that if the position requires access to Secret or Top Secret, additional determinations nevertheless are required for access to Sensitive Compartmented Information and classified intelligence information. Presumably, if the position requires access to only Confidential or to no classified information at all, additional determinations are not required. In any event, this definition probably is not the appropriate spot to provide for higher access standards as to Sensitive Compartmented Information. Indeed, it may be that the last sentence of the definition is not needed in view of the existence of the last sentence of section 4.

j. If we are to broaden the exemption provision (section 3(b)) beyond the three agencies named in the OMB draft, probably we should provide for exemption of all Intelligence Community agencies and components; conversely, agencies other than Intelligence Community agencies are of no concern to the DCI. Also, I would revise the exemption language slightly, as follows: "Any Intelligence Community organization, as defined by Executive Order 11905, with programs based on procedures or requirements established by or pursuant to statute or other Executive Order shall be excluded from those Civil Service Commission regulations and procedures and those provisions of this Order which conflict with such statutes, Executive Orders or the procedures established pursuant thereto." We should consider also whether to advise OMB that the new E.O. 10450 would be in conflict with the sources and methods proviso and section 102(c) of the National Security Act.

k. With reference to section 4, we should give some thought to whether we would prefer not to have the Act of 26 August 1950 (5 U.S.C.A. 7531, 7532) apply to CIA. It does now, as provided by E.O. 10450. The Act authorizes suspensions or terminations, in the interest of national security. OGC

FOIAB5

I believe the Agency-proposed revision of section 4 is somewhat off target in that there are no "standards contained herein," at least not standards for access. Probably a revision such as the following would accomplish our purpose: "with Executive Order 11652, provided however that the Director of Central Intelligence is authorized to prescribe standards for access to Sensitive Compartmented Information, intelligence sources and methods information and intelligence information."

l. The definition of "national security" (section 6(a)(1)) appears garbled, or at best, unclear. It appears to include activities directly related to the protection of the Government from, among other things, activities which protect the nation from subversion or aggression.

m. Our amendment to the criteria for designating Positions of Special Trust appears to be incorrect. Our amendment would not permit the designation of positions which require access to Sensitive Compartmented Information or information revealing intelligence sources, methods or analytical procedures. Thus those positions would be general positions only, for which the far less protective standards of subsection 5(a) would apply.

n. The standards set by section 6(b)(1)(vi) are probably too high to be useful. Probably very few functions are "vital" functions of an agency "critical" to national security interests. Further, is it the agency or the functions which must be "critical" to national security interests? I would suggest instead "or impair functions important to national security interests."

o. The provision excluding certain positions from Positions of Special Trust, in the paragraph ending subsection 6(b)(1) on page 9, seems illogical and unnecessary. I would delete everything beginning with "in that the standard," etc.

p. Under subsection 6(c), DIA, NSA, FBI, INR and other components of the Intelligence Community could not designate Positions of Special Trust, since those entities were not established by statute or executive order. Also, it is burdensome and unnecessary to require that only the "heads" of agencies may so designate; we understand it is intended that this authority is not to be delegable. Subsection 6(c)(2)(i) is abject nonsense. The agency head is to certify that the action he has taken--designation of positions--was a "valid" determination, valid apparently in the sense of being a determination which is correct under the standards of the Order. The Agency deletion of the words "designation of each separate position" is essential, as that phrase apparently means each separate position is to be designated individually.

q. Subsection 6(c)(2)(ii) is equally silly. What purpose is to be served by such certifications?

r. Deletion of the word "accurate" from subsection 7(b) seems highly desirable but perhaps does not go far enough. Probably it is possible to fully corroborate much information which though not fully corroborated rightfully should be considered. I would suggest instead "as fully corroborated as reasonably feasible or warranted."

s. The last few lines of subsection 7(b) seems to permit the acquisition of information which constitutes a bona fide qualification for unlawful or unconstitutional activities. Some correction would be in order.

t. The CIA revision of subsection 7(d)(1) seems inappropriate. An individual's "identity" cannot meet the standards of section 5. And "loyalty," in this subsection, is redundant in view of the use of that word also in subsection 5(b).

u. The requirements for filling positions prior to completion of investigations (section 7(d)(2)) seem much too high. Must there be an emergency, plus one or all, f(i) through (iii)? Must all of the latter be present or only one of them?

It should not be necessary that the agency head personally make the determinations required by the subsection. If the agency head is entrusted with national security duties, it is simply incongruous to deny him the authority to delegate the authority to determine when positions may need to be filled in advance of the security clearance.

v. Subsection 7(d)(3) seems to have no practical consequence. What happens if special qualifications are verified?

w. The proposed amendment to 7(e)(1) seems unnecessary. Probably there are no statutes which would preclude the opportunity to explain, but if there are any, the new E.O. 10450 could not negate the statute. The original language seems satisfactory.

x. Query the desirability or necessity of subsection 7(e)(2). There are requirements for reporting indications of crime (28 U.S.C. 525 and E.O. 11905). If the new E.O. 10450 imposes even broader requirements, this tends even more to put all agencies in the law enforcement business. Or, if the paragraph is to remain, the "investigative jurisdiction of the FBI" should be defined or identified.

y. The new 7(f)(1)(ii) seems unnecessary. The original (iii) covers the subject.

z. The proposed amendment to 7(f)(2) seems questionable. There are no "unlawful" missions of an agency. It is difficult to conclude that certification to the subject is inconsistent with the mission of any agency or with any other Executive Orders. But if those limitations are included, it seems unnecessary to delete items (v) through (vii).

aa. The meaning of the new 7(f)(4)(iii) is not clear.

bb. I doubt that the amendment to 7(f)(4)(v) invokes any authority from the National Security Act or E.O. 11905.

cc. Would it not be better to modify 7(f)(4)(viii) to refer to "organizations of the Intelligence Community" as defined by E.O. 11905? Why delete the reference to "Appendix D of Chapter 736 of the Federal Personnel Manual?" I understand the Agency policy is to adhere to it.

dd. Should not CIA investigation services be made available to legislative and judicial agencies insofar as CIA information is to be made available to those agencies? See section 7(h).

ee. It is highly illogical to authorize agency heads to designate those Positions of Special Trust which require five-year reinvestigation of the incumbents and then severely restrict the scope of that investigation. See 7(j)(1). It is also illogical to permit only five-year

investigations. Heads of agencies are in the best positions to determine the frequency of reinvestigation and cost factors will prevent abuse. I would delete all of 7(j)(1) beginning with "provided that" in the seventh line of page 21, and I would not limit reinvestigations to five-year frequencies.

ff. I would add "or induce" following the word "cause" in 8(b)(2)(i). I would add "reasonably" before the word "cannot" in 8(b)(2)(vi).

gg. The substitution of "demonstrative" for "contributing" in 8(b)(2)(vi) appears to be an error.

hh. I see no reason why the absence or presence of "effort toward rehabilitation" should not be considered in the adjudication process. See 8(b)(2)(viii).

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ii. The proposed amendment to section 9(a) appears incorrect.

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jj. The oversight mechanism seems cumbersome and inadequate for national security needs. The National Security Council--a committee of the President, the Vice President and the two national security cabinet members (State and Defense)--as a practical matter, is not in a position to oversee the Civil Service Commission and the departments and agencies. See section 13(a). Also, with reference to that subsection, what is the Civil Service Commission program directive to do?

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Associate General Counsel